

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish continuing disability or residuals, on or after September 21, 2014, causally related to the accepted March 30, 1981 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on March 30, 1981 appellant, then a 26-year-old deputy marshal, sustained lumbosacral derangement and degeneration of the lumbar or lumbosacral intervertebral disc when she slipped while exiting a vehicle while in the performance of duty. She stopped work on the date of injury and has not returned. OWCP paid appellant compensation for total disability on the periodic rolls.

By decision dated September 16, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective September 21, 2014, based on a May 15, 2014 medical report of Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon serving as a second opinion physician, who opined that, based on the lack of current objective physical findings, she had no residuals or disability causally related to her accepted March 30, 1981 employment injury and that she could return to her regular work as a deputy marshal on a full-time basis without restrictions. Appellant, through counsel, then appealed to the Board.

By decision dated March 28, 2016, the Board affirmed the September 16, 2014 decision, finding that the opinion of Dr. Millheiser constituted the weight of the medical opinion evidence that appellant's accepted March 30, 1981 employment injury had resolved without residuals or disability.⁴

On March 27, 2017 appellant, through counsel, requested reconsideration and submitted evidence. In a March 3, 2017 letter, Barbara F. Stern, Ph.D., a licensed psychologist, noted appellant's financial hardship, and that appellant struggled with back injuries and disability issues and as a result, was overwhelmed with anxiety and depression.

OWCP, by decision dated May 11, 2017, denied modification of its termination decision, finding Dr. Stern's opinion insufficient to outweigh the opinion of Dr. Millheiser.

Thereafter, OWCP continued to receive additional evidence. In an October 27, 2017 report, Dr. Rommel R. Francisco, a Board-certified orthopedic surgeon, noted that appellant

³ Docket No. 15-0438 (issued March 28, 2016); Docket No. 14-0075 (issued April 3, 2014); *Order Dismissing Petition for Reconsideration*, Docket No. 09-0675 (issued February 25, 2010); Docket No. 09-0675 (issued October 14, 2009).

⁴ Docket No. 15-0438 (issued March 28, 2016).

presented with a complaint of chronic back pain. He conducted a physical examination and diagnosed lumbago and radicular pain of both lower extremities.

Dr. Gary P. Laux, an attending Board-certified physiatrist, noted in reports dated December 18, 2017 and February 19, 2018, that appellant presented for a follow-up evaluation of pain in her lower extremities, lumbago, and lumbosacral facet joint syndrome. He discussed examination findings and reviewed diagnostic test results. Dr. Laux provided assessments of lumbosacral facet joint syndrome, radicular pain of both lower extremities, lumbago, and chronic lumbar radiculopathy. He noted that appellant reported that these injuries stemmed from an incident on March 30, 1981 when she slipped while getting out of a vehicle

A February 16, 2018 electromyogram/nerve conduction velocity (EMG/NCV) study by Dr. Jeffrey Rubin, a Board-certified neurologist, revealed neurophysiologic evidence consistent with chronic right-sided L4 greater than L5 radiculopathy.

On May 10, 2018 appellant, through counsel, requested reconsideration of the May 11, 2017 decision and submitted additional reports by Dr. Laux. In an April 6, 2018 report, Dr. Laux noted that he had reexamined appellant and again reviewed diagnostic test results. He again diagnosed lumbosacral facet joint syndrome, chronic lumbar radiculopathy, and lumbago. Dr. Laux also reiterated the history of injury on March 30, 1981 as related by her.

In an April 24, 2018 report, Dr. Laux noted that he had reviewed Dr. Millheiser's May 15, 2014 report and advised that he disagreed with Dr. Millheiser's conclusions that there were no significant objective findings to support residuals which prevented appellant from returning to work as a deputy marshal. He reviewed the Department of Labor's (DOL) definition of the U.S. deputy marshal position, which required medium strength level work, exerting up to 50 pounds occasionally and up to 25 pounds frequently. Dr. Laux opined that there were objective findings of residuals and disability causally related to appellant's March 30, 1981 employment injuries and that she was not capable of performing medium strength level work. He noted that, during his examinations, as indicated in his office notes and records, she demonstrated bilateral lumbar paraspinal muscle spasms and tenderness. Dr. Laux referenced his January 25, 2018 office notes and positive straight leg raising tests performed on October 25 and December 18, 2017. Additionally, he noted that NCV studies demonstrated neurophysiologic of chronic right-sided L4-5 radiculopathy, an October 25, 2017 lumbar spine x-ray showed multilevel degenerative changes, and a December 15, 2017 lumbar spine magnetic resonance imaging (MRI) scan revealed degenerative disc disease at L2-3 to L5-S1 and multilevel foraminal central canal stenosis. Dr. Laux maintained that this correlated with appellant's complaint of low back pain with radicular symptomatology and the EMG/NCV study of her bilateral lower extremities. He concluded that the plethora of objective studies demonstrated continuing residuals from the accepted injury. Dr. Laux noted that some of these objective studies, such as the most recent MRI scan and the February 16, 2018 NCV studies were not available to Dr. Millheiser at the time of his 2014 examination. Based upon his clinical examinations as correlated by the objective studies dating back to June 8, 1981, he opined that appellant still had residuals of her accepted injuries. Dr. Laux concluded that this condition prevented her from resuming her duties as a deputy marshal because she was not capable of performing the physical requirements of such a position.

By decision dated August 14, 2018, OWCP denied modification of its May 11, 2017 decision. It found that the medical evidence submitted, including Dr. Laux's April 6 and 24, 2018 reports, were insufficiently rationalized to outweigh Dr. Millheiser's opinion.

Appellant thereafter submitted a May 11, 2019 statement in which she described the work duties she actually performed as a deputy marshal. She also described the physical requirements of her position, which included sitting at a desk six to eight hours, sitting at a court and jailhouse and driving a vehicle four to eight hours, riding a train four to five hours, walking at least four miles in the span of three hours, standing four to six hours sometimes continuously, carrying supplies or files weighing 10 to 15 pounds, and physically restraining prisoners and suspects.

On June 12, 2019 appellant, through counsel, again requested reconsideration and submitted a June 7, 2019 report from Dr. Laux who noted that he had reviewed appellant's May 11, 2019 statement. Dr. Laux referenced his April 24, 2018 report in which he identified objective findings in support of his opinion that she had continuing employment-related residuals. He advised that any relief from appellant's symptoms were only temporary as indicated in his office notes and records. Dr. Laux further advised that she had not been and was not capable of performing the physical requirements of her job as indicated in her May 11, 2019 statement. He maintained that appellant was unable to sit at her desk six to eight hours as her condition required her to lie down intermittently throughout the day at unpredictable intervals. Dr. Laux further noted that she was not capable of sitting at the court house or jail or driving a vehicle four to eight hours per day, or riding a train four to five hours due to her low back condition, which included pain, spasms, and radicular symptoms, as indicated in his office notes and records. Additionally, he noted that appellant could not walk up to four miles per day due to her lumbar radiculopathy. Dr. Laux also noted that she was not capable of standing four to six hours per day. Appellant could lift 15 pounds from the floor for a relatively short distance. Dr. Laux noted that he had no knowledge regarding how high or the distance she could lift weight. Lastly, he advised that appellant was not physically capable of restraining prisoners or suspects due to her low back condition and she endanger herself and others if relied upon to do so.

OWCP, by decision dated September 12, 2019, denied modification of its August 14, 2018 decision.

LEGAL PRECEDENT

Once OWCP properly terminates a claimant's compensation benefits, the burden shifts to him or her to establish continuing disability or residuals after that date, causally related to the accepted injury.⁵ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.⁶

⁵ See *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *J.R.*, Docket No. 17-1352 (issued August 13, 2018).

⁶ *Id.*

ANALYSIS

The Board finds that the case is not in posture for decision.

As the Board had previously affirmed the termination of appellant's wage-loss compensation and medical benefits on March 28, 2016 absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.⁷ The only issue before the Board is whether she has established continuing disability or residuals on and after September 21, 2014, causally related to the March 30, 1981 employment injury.

In support of her requests for reconsideration, appellant submitted a series of medical reports from Dr. Laux. In an April 24, 2018 report, Dr. Laux disagreed with Dr. Millheiser's May 15, 2014 conclusion that there were no significant objective findings establishing residuals of her accepted employment injuries that prevented her from returning to her deputy marshal position without restrictions. He opined that appellant continued to have residuals of her work-related March 30, 1981 injury and was totally disabled causally related to the accepted March 30, 1981 employment injury. Dr. Laux explained that DOL's definition of a deputy marshal position, objective test results, and examination findings supported his opinion that she was not physically capable of performing the physical requirements of her position. In a June 7, 2019 report, he advised that appellant only experienced temporary relief from her symptoms and explained why she was not capable of performing the specific physical requirements of her deputy marshal position.

The Board finds that, although Dr. Laux's reports are insufficient to discharge appellant's burden of proving that she had continuing disability or residuals, on or after September 21, 2014 due to the accepted March 30, 1981 employment injury, his opinion is of sufficient probative value to require further development of the case record by OWCP, and is uncontroverted in the record.⁸

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.⁹

On remand OWCP shall refer appellant, along with a statement of accepted facts and the case record, to an appropriate Board-certified specialist for a second opinion examination and an evaluation regarding whether she has continuing disability and residuals on or after September 21, 2014 causally related to the accepted March 30, 1981 employment injury. After this and such further development as deemed necessary, it shall issue a *de novo* decision.

⁷ *E.H.*, Docket No. 19-1352 (issued December 18, 2019); *O.W.*, Docket No. 19-0316 (issued June 25, 2019); *V.G.*, Docket No. 17-0583 (issued July 23, 2018); *D.M.*, Docket No. 18-0067 (issued May 9, 2018); *P.B.*, Docket No. 17-1687 (issued May 8, 2018).

⁸ *E.P.*, Docket No. 14-1298 (issued January 7, 2015); *Walter J. Fisher*, Docket No. 03-0615 (issued May 22, 2003).

⁹ *E.P.*, *id.*; *A.A.*, 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004); *Walter J. Fisher*, *id.*

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with decision of the Board.

Issued: September 30, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board